

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, Linda Breathitt,
and Nora Mead Brownell.

ANR Pipeline Company

Docket No. RP99-301-029

ORDER ON REHEARING

(Issued November 21, 2001)

ANR Pipeline Company (ANR) and CoEnergy Trading Company (CTC) filed requests for rehearing of the Commission's August 1, 2001 letter order issued¹ in this proceeding. That order accepted a service agreement executed between ANR and CTC, subject to ANR demonstrating that the service at issue could not be provided under a generally applicable rate schedule developed consistent with other aspects of ANR's tariff. In the alternative, the Commission required ANR to file a revised agreement without the non-conforming provision. As discussed below, the Commission will grant the rehearing requests in part because ANR has demonstrated that Section 11.2 of the General Terms and Conditions (GT&C) of its FERC Gas Tariff permits all shippers to negotiate minimum pressure requirements. However, the Commission will order ANR to make a change with regard to a primary receipt point provision contained in the service agreement. This decision is in the public interest because it approves an agreement that is consistent with our policy and provides flexibility to meet the needs of a shipper and the pipeline, without affecting pipeline operations and other shippers and prevent undue discrimination among shippers.

Background

On July 2, 2001, ANR filed a negotiated rate agreement between ANR and CTC for transportation service, under Rate Schedule FTS-1, with a July 1, 2001 effective date. ANR stated that CTC would use the agreement to deliver gas to the Menasha Paper facility. This facility is a cogeneration plant that is dependent on natural gas supplies as the sole fuel source for two combustion turbines. In lieu of CTC installing its own compressors on

¹ANR Pipeline Co., 96 FERC ¶ 61,183 (2000).

the site to ensure adequate gas flow and pressure, ANR and CTC negotiated the agreement wherein ANR agreed to a minimum pressure at the relevant delivery point pursuant to section 11.2 of the General Terms and Conditions of ANR's tariff. In addition, the parties agreed that ANR would provide rate relief in the event that ANR could not maintain the pressure and CTC had to use a third-party to transport the gas. ANR agreed to reimburse CTC the lesser of the cost of such third-party transportation or the transportation rate paid by CTC to ANR. The agreement would also allow CTC to either designate another primary point or cancel the agreement if its gas sales agreement relating to the Menasha Paper facility is terminated.

In the August 1, 2001 letter order, the Commission determined that the minimum pressure and rate relief provisions are material deviations from ANR's pro-forma service agreement. The Commission believed that these types of provisions are in effect negotiating terms and conditions of service. The Commission explained that these types of provisions in a negotiated rate agreement, which are not available to all shippers, are unduly discriminatory and preferential. Nevertheless, the Commission accepted and suspended the agreement, to be effective July 1, 2001, subject to ANR demonstrating that it could not include these types of provisions in a generally applicable rate schedule developed consistent with other aspects of its tariff. The Commission directed ANR to file an explanation or to file a revised service agreement without the nonconforming provisions by September 17, 2001.

Request for Rehearing

ANR and CTC argue that the negotiation of minimum pressure obligations is authorized by section 11.2 of its GT&C. CTC further explains that the pressure requirement in the agreement between it and ANR is a quantity term because if minimum pressures are not maintained on the pipeline, there is no quantity guarantee which is why section 11.2 of ANR's GT&C allows for negotiation over pressure requirements.

With regard to the rate relief provision, the parties argue that the Commission should have accepted the proposed provision as part of a negotiated rate agreement. CTC explains that the rate relief provision attaches a financial consequence to the failure to maintain minimum pressure requirements and is analogous to buyout provisions approved in other cases. The parties argue the Commission erroneously treated the provision as a negotiated term and condition of service instead of finding that the provision was appropriately included in a negotiated rate agreement. They contend this treatment is contrary to the Commission's policy and precedent regarding negotiated rates and negotiated terms and conditions and the only explanation the Commission gave for its decision to depart from its previous policy and precedent is that the provision is unduly discriminatory and

preferential because it is not available to all shippers. They believe this rationale is incorrect in light of the statement in Order No. 637 which provides that:

[a] negotiated rate would not include conditions or activities related to the transportation of gas on the pipeline, such as scheduling, imbalances, or operational obligations such as OFOs. By contrast, negotiated rate agreements can include the price, the term of service, the receipt and delivery points, and the quantity.²

The parties explain that the rate relief provision is not a negotiated term and condition of service under Order No. 637's policy because the provision does not relate to the operation of ANR's system, nor does it harm any other shipper. The parties state that pipelines' forms of service agreements generally include blank spaces for the insertion of price, term of service, receipt and delivery points and MDQ. They believe the Commission's reference in Order No. 637 to these terms as properly includable in negotiated rate agreements has been interpreted in subsequent cases to mean that provisions addressing these terms in a manner that may deviate from the Form of Service Agreement are also includable in negotiated rate agreements.

The parties argue that the decision applies what is essentially a new policy to existing contracts, but that they reasonably relied on Commission policy that existed at the time. If the Commission refuses to alter its findings on rehearing, the parties request the Commission to acknowledge that it is adopting a new policy governing pipeline contract practices and apply it prospectively only.

Discussion

For the reasons discussed below, the Commission grants the requests for rehearing as to the minimum pressure and rate relief provisions. However, with regard to the provisions allowing CTC to either cancel the agreement or designate another primary point, we will direct ANR to make a change to the service agreement.

Minimum Pressure and Rate Relief Provisions

²Order No. 637, Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services, FERC Stats & Regs. ¶ 31,091 at 31,343-44 (2000).

ANR filed this agreement for approval as a negotiated rate pursuant to section 30 of its General Terms and Conditions authorizing it to enter into negotiated rate agreements. The primary issue raised on rehearing concerning the minimum pressure and rate relief provisions, therefore, is whether those provisions are appropriately included in a negotiated rate agreement under Commission policy or whether they constitute impermissible negotiated terms and conditions of service.

The Commission determined in Order No. 637 not to provide pipelines with the authority to file for preapproval of the right to negotiate terms and conditions of service with individual customers. In Order No. 637, the Commission stated that it generally considers negotiated terms and conditions to be related to operational conditions of transportation service. By contrast, Order No. 637 stated that negotiated rates, which the Commission does authorize, include non-operational matters such as "the price, the term of service, the receipt and delivery points, and the quantity."³

Order No. 637 stated that examples of conditions to be related to operational conditions of transportation service that generally could not be individually negotiated, "scheduling, imbalances, or operational obligations such as OFOs."⁴ Subsequently, the Commission has held that negotiated terms and conditions of service include any provisions that result in a customer receiving a different quality of service than that provided other customers under the pipeline's tariff or that effect the quality of service received by others. An example would be where a pipeline's tariff requires all customers to maintain uniform hourly flows but the pipeline negotiates a special provision allowing one customer to deviate from the tariff's uniform hourly flow requirements. Consistent with Order No. 637, where a contract contains a negotiated term and condition of service, the Commission would require that the pipeline modify its tariff to offer the negotiated service to all its customers or explain why it can only provide the service to this one customer.

Section 11.2 of the General Terms and Conditions in ANR's tariff provides that ANR shall deliver gas at the pressure generally prevailing in the pipeline, "provided, however, that the minimum pressure which the Transporter shall be obligated to maintain shall not be less than two hundred-fifty pounds per square inch, gauge pressure, unless otherwise mutually agreed to between Shipper and Transporter." Accordingly, as CTC points out on rehearing, ANR's tariff does provide that it can agree to minimum pressure levels with all its shippers. Therefore, ANR's agreement to include a minimum pressure obligation in a shipper's service agreement does not constitute a negotiated term and

³Order No. 637, III FERC Stats & Regs. ¶ 31,300 at 31,344.

⁴Id.

condition of service. Since the tariff offers minimum pressure provisions to all shippers, inclusion of such an obligation in any individual shipper's contract does not give that shipper a different quality of service than that offered all shippers under the tariff.

However, as both ANR and CTC recognize, the provision for rate relief in the event that ANR cannot maintain the pressure and CTC has to use a third-party to transport the gas is not authorized by the tariff, except to the extent it can be considered a negotiated rate authorized by section 30 of ANR's tariff giving it negotiated rate authority. Upon reconsideration, the Commission finds that the rate relief provision is a permissible negotiated rate provision, rather than a negotiated term and condition of service. A reduction in CTC's rate, because ANR was unable to make deliveries at the required pressure level does not relate to operational conditions of transportation service on ANR. It affects only the rate that CTC must pay for the service it receives, not the quality or amount of that service. Nor would such a reduced rate adversely affect the quality of service received by others or prevent others from obtaining service. Indeed, no other shippers on ANR's system have objected to the rate relief provision in CTC's contract.

In other cases, the Commission has allowed pipelines to enter into negotiated rate agreements where the rate is adjusted depending upon certain operational considerations. For example, in Natural Gas Pipeline Co.,⁵ the Commission approved a negotiated rate agreement under which the shipper would pay a higher rate when it segmented capacity in return for a discounted rate when it did not segment its capacity. The instant agreement is similar. The shipper pays one rate when pressure is maintained above a set level, and a lower rate when it is not. ANR must, of course, offer negotiated rates such as this on a not unduly discriminatory basis. The fact ANR has filed this agreement, as it must, has given its other shippers an opportunity to raise any issues of discrimination. None has. Therefore, the Commission approves this aspect of the negotiated rate agreement.

Contract Cancellation Provision

Our further review of the service agreement between ANR and CTC reveals that the service agreement also includes a provision permitting CTC to either cancel the agreement or designate another primary point if its gas sales agreement relating to the Menasha Paper facility is terminated. ANR's tariff and Form of Service Agreement contain no provisions allowing customers to terminate agreements early. Therefore, the provision in the agreement permitting cancellation is a material deviation from ANR's form of service agreement.

⁵93 FERC ¶ 61,282 (2000).

As the Commission has determined in contemporaneous orders being issued in ANR's Docket Nos. GT01-25-001 and RP99-301-030, material deviations from the Form of Service Agreement fall into two general categories -- those that must be prohibited because they present a significant potential for undue discrimination among shippers and those that can be permitted without substantial risk of undue discrimination. The Commission further found in those orders that contract provisions allowing a customer to reduce or terminate its contract demand present too much potential for undue discrimination, unless they are offered in the pipeline's tariff pursuant to generally applicable conditions. The Commission held that, while a pipeline may place reasonable conditions on the negotiation of contract demand reduction rights,⁶ such conditions must not be unduly discriminatory. The Commission determined that requiring pipelines to file generally applicable tariff provisions setting forth the conditions under which they will offer contract demand reduction rights is the best means of assuring that those rights will be negotiated in a not unduly discriminatory manner. Such a tariff filing would give the Commission and other interested parties an opportunity to review the circumstances in which the pipeline will offer contract demand reduction rights. Also, once approved, the tariff provision will require the pipeline to grant similar rights to similarly situated customers.

Applying the Commission's analysis in Docket Nos. GT01-25-001 and RP99-301-030 in this case, the Commission finds that the provision permitting CTC to cancel the agreement if its gas sales agreement relating to the Menasha Paper facility is terminated presents too much potential for undue discrimination. Therefore, the Commission disapproves that provision and requires that it be removed from the contract. If ANR wishes to offer such provisions to a shipper, it may file a tariff provision proposing the non-discriminatory conditions pursuant to which it proposes to offer such provisions. We recognize that ANR has stated that it cannot offer all its customers the same rights to reduce or buyout their contract demand, and it desires to tailor such provisions to the circumstances of individual customers. However, ANR's explanation of how it has negotiated more narrowly drawn rights to reduce contract demand with customers who have larger contract demands only increases our concern about the potential for undue discrimination in the offering of contract adjustment rights. It is clear that ANR has negotiated quite different contract demand reduction rights with different customers. This reinforces our conclusion that such provisions should only be offered under generally applicable tariff provisions setting forth the conditions under which the pipeline will offer contract demand reduction rights.

⁶For example, it may be reasonable for a pipeline to tie contract demand reduction rights to certain events, such as the closure of the plant being served by a particular contract or, in the case of an LDC, a loss of customers through retail unbundling or a bypass.

The Commission also disapproves at this time the alternative provision for CTC to change its primary point if its gas sales agreement relating to the Menasha Paper facility is terminated. A special provision in a shipper's contract allowing it to change a primary point without following the regular procedures set forth in a pipeline's tariff for such changes could adversely affect others seeking primary point capacity from the pipeline, since the shipper with the special provision would have a priority for obtaining the primary point capacity. Thus, such a special right to change primary points is contrary to Commission policy. ANR states that in its Order No. 637 proceeding in Docket No. RP00-332-000 it has proposed a tariff provision as part of a settlement agreement that would give all its shippers a right to change primary points subject to generally applicable conditions. However, that settlement proposal has not yet been acted on by the Commission. Therefore, that proposal does not, at this time, provide support for ANR giving CTC such a right.

The Commission orders:

(A) The request for rehearing is granted with respect to the minimum pressure and rate adjustment provision.

(B) Within 30 days of the date of this order, ANR must file a revised agreement with CTC, removing the provision permitting CTC to terminate the service agreement or change its primary point if the gas sales agreement related to the Menasha plant is terminated.

By the Commission.

(S E A L)

David P. Boergers,
Secretary.

